LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 21 1953
HAROLD B. WILLEY, Clerk

No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

WILBUR C. KING, JERRY W. CARTER and RICHARD MACK, as and constituting the FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, *Appellants*,

v.

THE UNITED STATES OF AMERICA, *Appellees*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Appellee*.

Appeal from the United States District Court for the Northern District of Florida

---

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AND CERTAIN STATE REGULATORY COMMISSIONS, AMICI CURIAE.

JOHN P. RANDOLPH,
AUSTIN L. ROBERTS, JR.,
Attorneys for Said Association and Said State Commissions.
7413 New Post Office Building,
Washington 4, D. C.

January 21, 1953.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 9

WILBUR C. KING, JERRY W. CARTER and RICHARD MACK, as and constituting the FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, *Appellants*,

v.

THE UNITED STATES OF AMERICA, *Appellees*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Appellee*.

Appeal from the United States District Court for the Northern District of Florida

---

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AND CERTAIN STATE REGULATORY COMMISSIONS, AMICI CURIAE.

PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners is a voluntary association, the membership of which embraces the members of the railroad and public utility regulatory commissions and boards of all the 48 States of the United States, the District of Columbia and

the Territories of Puerto Rico and Hawaii. By the Constitution of the Association either the President or the Executive Committee of the Association is empowered to direct the General Solicitor to appear on behalf of the Association (as distinguished from the individual commissions within its membership) in any proceeding pending before any court or commission in which, in the judgment of the President or Committee, appearance on behalf of the Association should be made. This memorandum is filed on behalf of the Association by direction of the President of the Association in the general public interest.

To the Honorable Supreme Court of the United States:

Come now the National Association of Railroad and Utilities Commissioners and the hereinafter listed state regulatory commissions, *amici curiae*, and present this memorandum in support of the petition for rehearing presented by the appellants in the above-entitled cause, and in support thereof respectfully show:

1. The following state regulatory commissions which are empowered to fix the intrastate rates for railroads in their respective states are concerned over the far-reaching effect of the majority decision in this cause upon the power and jurisdiction of state commissions to fix intrastate freight rates for railroads. The effect of the decision for all practical purposes is to permit the Interstate Commerce Commission under Section 13 (4) of the Interstate Commerce Act to completely supersede the jurisdiction of state commissions in fixing intrastate freight rates. Because of this concern of state regulatory commissions the National Association of Railroad and Utilities Commissioners has been authorized by its duly constituted President to file this statement in support of the petition for rehearing presented by appellants and the following individual state

commissions have authorized the National Association to join them as parties to this statement, to-wit:

Alabama	Public Service Commission
Arizona	Corporation Commission
Arkansas	Public Service Commission
California	Public Utilities Commission
Colorado	Public Utilities Commission
Connecticut	Public Utilities Commission
Georgia	Public Service Commission
Idaho	Public Utilities Commission
Iowa	State Commerce Commission
Kansas	State Corporation Commission
Kentucky	Railroad Commission
Louisiana	Public Service Commission
Maine	Public Utilities Commission
Maryland	Public Service Commission
Massachusetts	Department of Public Utilities
Minnesota	Railroad and Warehouse Commission
Missouri	Public Service Commission
Mississippi	Public Service Commission
Montana	Board of Railroad Commissioners
Nevada	Public Service Commission
New Hampshire	Public Utilities Commission
New Jersey	Board of Public Utility Commissioners
New Mexico	State Corporation Commission
North Carolina	Utilities Commission
North Dakota	Public Service Commission
Oregon	Public Utilities Commissioner
Ohio	Public Utilities Commission
Rhode Island	Department of Business Regulation
South Carolina	Public Service Commission
South Dakota	Public Utilities Commission
Utah	Public Service Commission
Vermont	Public Service Commission
Washington	Public Service Commission
Wyoming	Public Service Commission

2. This being a sweeping statewide increase in intrastate freight rates ordered by the Interstate Commerce Commission under Section 13 (4) of the Interstate Commerce Act, certain findings must be made that are supported by substantial evidence. One of the essential findings in a case

of this kind is that the intrastate operations do not produce an adequate return considering the cost of the service and the investment required to render the intrastate service. If the intrastate rates fixed by the State Commission produce such an adequate return then there is no undue burden upon interstate commerce and no discrimination against interstate commerce. Under such circumstances Section 13 (4) is not to be invoked.

If we correctly understand the record there was no concrete evidence placed before the Interstate Commerce Commission to show the investment of the railroads in their intrastate business, the cost of rendering the service or the return on investment after cost and the Interstate Commerce Commission made no finding in this respect. If such be the case then this case comes squarely within the ruling in *North Carolina* v. *United States*, 325 U.S. 507.

A statewide case of this kind involving all the interstate railroad freight rates in Florida is to be distinguished from such cases as the *Shreveport case, Houston East & West Texas Railway Company et al* v. *United States*, 234 U.S. 342 and *Illinois Commerce Commission et al* v. *United States*, 292 U.S. 474. In these cases point to point operations were shown and the varying rates between points for comparable distance both intra- and interstate were shown and the lower intrastate rates were shown to give an advantage to the intrastate shippers over the interstate shippers, thus a clear discrimination between points and persons was established by the evidence. In the case now before this Honorable Court no such showing was made. The conclusions of the Interstate Commerce Commission couched largely in the language of Section 13 (4) appear to be based in large measure upon the mere fact that the intrastate rates are lower than the interstate rates and that had the same rate been in effect intrastate as had been fixed for interstate traffic the railroads would have received $915,325.60 more revenue a year. The report of the commission designates this as a revenue loss to the railroads

without any apparent consideration of whether or not the railroads required such additional revenue in order to earn an adequate return upon their intrastate business taking into account the cost of the service and the investment in intrastate business.

If the theory of the Interstate Commerce Commission which is advanced here, that it has the power to advance intrastate freight rates for the purpose of making the same reasonable, in its judgment, from a revenue standpoint, and not for the purpose of removing discrimination as to persons or localities, is upheld by this Court, then the duly constituted authorities of the several states which are authorized by statute to fix intrastate rates in their respective states are to be completely frustrated and aborted. Due comity between the several levels of government lends strength to the credence that the Interstate Commerce Commission is not so empowered.

3. The majority opinion in this cause points out that a committee of cooperating state commissioners sat during the hearings of the general interstate freight rate case before the Interstate Commerce Commission. The existence of such cooperation, we believe, rests upon the assumption that there is a field in which the Interstate Commerce Commission cannot act. Such cooperation is in recognition of divided powers and responsibilities and for the purpose of developing the facts and reaching agreement, where appropriate, as to how their respective powers shall be exercised; for generally the record made before the Interstate Commerce Commission in the interstate freight rate hearing is submitted in evidence before the individual state commissions during hearings on respective intrastate freight rate increases. If, as asserted here, the federal commission is all powerful, then cooperation is reduced to a paternalistic and patronizing courtesy of the most discourteous kind and one may seriously question its desirability under such circumstances.

4. What then happens to statutory provisions for state court review of respective state commission orders to the extent that the rates involved pertain only to intrastate shipments and where the federal commission authority is upheld on a revenue basis, without a section 13 (4) showing of discrimination against persons or localities in interstate commerce? We cannot believe that the language of section 13 (4) was intended to so castigate the powers and provisions of the state courts and the state statutes. See *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341.

5. There is a remarkable parallel in the findings of the Interstate Commerce Commission in the *North Carolina case*, supra, and the instant case. In the *North Carolina case* this court examined the evidence and found that there was not substantial evidence to support the commission's conclusions. The majority opinion in the instant case states, "No question has been raised here as to the adequacy of the evidence upon which any of the findings are based." We respectfully submit that the court should carefully examine the record evidence and ascertain whether or not there is substantial evidence which shows that the revenue derived from the intrastate rates fixed by the Florida Commission is insufficient to produce an adequate return upon the intrastate business considering the cost of the intrastate operations and the investment in such business. Mr. Justice Douglas appears to be of the opinion that the record evidence not only does not make this required showing but that on the contrary the record shows the intrastate revenues are ample to carry their fair share of the load. Concerning this question the dissenting opinion states: "Of course, if intrastate freight operations fail to produce an adequate return as determined by reference to the cost of the intrastate operations and the investment in the intrastate business, interstate commerce is discriminated against. But there is no such failure in this case. Intrastate freight operations in Florida are amply profitable and carry their fair share of the load." If this statement which

was concurred in by Mr. Chief Justice Vinson be true, and it is inconceivable that the statement would be made if not true, then this alone gives ample reason why the petition for rehearing should be granted so that the court may carefully examine the record on this point and determine the adequacy of the evidence in this respect. If the record supports this statement by Mr. Justice Douglas, then as stated by Mr. Justice Black in his dissent, the *North Carolina case* is controlling and the order of the Interstate Commerce Commission in the instant case should be reversed.

CONCLUSION

It is respectfully urged that the petition for re-hearing be granted and that the order of the Interstate Commerce Commission be, upon further consideration, reversed.

Respectfully submitted,

JOHN P. RANDOLPH,
AUSTIN L. ROBERTS, JR.,

Attorneys for the state commissions heretofore listed and the National Association of Railroad Utilities Commissioners, *Amici Curiae.*

7413 New Post Office Building,
Washington 4, D. C.

January 21, 1953.

Certificate of Counsel

We, attorneys for the National Association of Railroad and Utilities Commissioners and the above-listed State regulatory commissions, *amici curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

JOHN P. RANDOLPH,
AUSTIN L. ROBERTS, JR.,
Attorneys for Said Association and Said State Commissions.